

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34178

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION AND CEDAR
AMERICAN RAIL HOLDINGS, INC. — CONTROL — IOWA, CHICAGO & EASTERN
RAILROAD CORPORATION

AGENCY: Surface Transportation Board.

ACTION: Decision No. 2 in STB Finance Docket No. 34178; Notice of Acceptance of Primary Application and Related Filings; Issuance of Procedural Schedule.¹

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the DME-2 primary application and the undesignated related filings filed August 29, 2002, by Dakota, Minnesota & Eastern Railroad Corporation (DM&E), Cedar American Rail Holdings, Inc. (Holdings), and Iowa, Chicago & Eastern Railroad Corporation (IC&E).² The primary application seeks Board approval and authorization under 49 U.S.C. 11321-26 for DM&E's acquisition of indirect control of IC&E through ownership of IC&E's stock by Holdings, which is itself a wholly owned subsidiary of DM&E. The related filings seek related trackage rights relief contingent upon approval of the primary

¹ This decision covers: a railroad control application, which was filed in STB Finance Docket No. 34178, Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. — Control — Iowa, Chicago & Eastern Railroad Corporation; a terminal trackage rights application, which was filed in STB Finance Docket No. 34178 (Sub-No. 1), Dakota, Minnesota & Eastern Railroad Corporation — Terminal Trackage Rights — Union Pacific Railroad Company; and a trackage rights exemption notice, which was filed in STB Finance Docket No. 34178 (Sub-No. 2), Dakota, Minnesota & Eastern Railroad Corporation — Trackage Rights Exemption — Iowa, Chicago & Eastern Railroad Corporation and Iowa Northern Railway Company. The railroad control application filed in STB Finance Docket No. 34178 is referred to as the "primary application." The terminal trackage rights application filed in STB Finance Docket No. 34178 (Sub-No. 1) and the trackage rights exemption notice filed in STB Finance Docket No. 34178 (Sub-No. 2) are referred to collectively as the "related filings."

² DM&E, Holdings, and IC&E are referred to collectively as applicants.

application. The Board finds that the transaction proposed in the primary application is a “minor transaction” under 49 CFR 1180.2(c).

The Board has considered applicants’ DME-3 petition for establishment of a procedural schedule, also filed August 29, 2002. With a modification to provide additional time for public comments, the Board is adopting the procedural schedule applicants have proposed (which, as modified, will allow the Board to issue a decision 29 days prior to the statutory deadline, assuming that no environmental review is required and further assuming that no oral argument is held). The Board’s schedule provides for issuance of a decision on the 45th day after the close of the record.

DATES: The effective date of this decision is **September 27, 2002**. Any person who wishes to participate in this proceeding as a party of record must file, no later than **October 15, 2002**, a notice of intent to participate. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and/or either or both of the related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by **November 14, 2002**. Responses to comments, protests, requests for conditions, and other opposition, responses to comments of DOJ and DOT, and rebuttal in support of the primary application and/or either or both of the related filings must be filed by **December 13, 2002**. For further information respecting dates, see Appendix A (Procedural Schedule).

ADDRESSES: Send an original and 25 copies of all pleadings referring to STB Finance Docket No. 34178 to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.³ In addition, one copy of all documents in this proceeding must be sent to: (1) Secretary of the United States Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3645, Department of Justice, Washington, DC 20530; (3) William C. Sippel, Esq., Fletcher & Sippel LLC, Two Prudential Plaza, Suite 3125, 180 North Stetson Avenue, Chicago, IL 60601-6721; and (4) David L. Knudson, Esq., Davenport, Evans, Hurwitz & Smith, L.L.P., 206 West 14th Street, Sioux Falls, SD 57104.

In addition to submitting an original and 25 copies of all paper documents filed with the Board, parties also must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or compact discs (CDs), copies of all textual materials, electronic workpapers, data bases and spreadsheets used to develop

³ In order for a document to be considered a formal filing, the Board must receive an original and 25 copies of the document, which must show that it has been properly served. Documents transmitted by facsimile (FAX) will not be considered formal filings and are not encouraged because they will result in unnecessarily burdensome, duplicative processing. In addition, each formal filing must be accompanied by an electronic submission per our requirements as discussed in detail in this decision.

quantitative evidence. Textual materials must be in, or compatible with, WordPerfect 9.0. Electronic spreadsheets must be in, or compatible with, Lotus 1-2-3 Release 9 or Microsoft Excel 2002. A copy of each disk or CD submitted to the Board should be provided to any other party upon request. Further details are discussed below.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1655. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The DM&E/IC&E common control for which applicants seek approval in the primary application involves the acquisition by DM&E of indirect control of IC&E through ownership of IC&E's stock by DM&E's Holdings subsidiary.

Dakota, Minnesota & Eastern Railroad Corporation. DM&E, a Class II railroad, owns or operates approximately 1,103 route miles of rail lines (including approximately 720 route miles of main lines and approximately 383 route miles of branch lines) in Wyoming, South Dakota, Nebraska, Minnesota, and Iowa. DM&E's principal route extends from Colony (Bentonite), WY, through Rapid City, SD, to Winona, MN. Branch lines extend from Rapid City to Crawford, NE, and Chadron, NE; from Blunt, SD, to Onida, SD; from Wolsey, SD, to Aberdeen, SD, via trackage rights on The Burlington Northern and Santa Fe Railway Company (BNSF); from Redfield, SD, to Mansfield, SD; from Waseca, MN, to Hartland, MN; and from Hartland, MN, to Mason City, IA, via trackage rights on Union Pacific Railroad Company (UP).⁴ DM&E also has a currently inactive branch line extending from Huron, SD, to Yale, SD, and currently inactive trackage rights on BNSF extending from Yale, SD, to Watertown, SD. DM&E also operates via trackage rights over Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CP), between Minnesota City, MN, and Winona, MN, and via trackage rights over short, isolated segments of UP-owned trackage in Mankato, Owatonna, and Winona, MN.

DM&E's principal yard and terminal facilities are located at Waseca and Tracy, MN, and Huron, Pierre, and Rapid City, SD. DM&E interchanges traffic with UP at Winona and Mankato, MN, and at Mason City, IA; with CP at Minnesota City, MN; with BNSF at Wolsey, Aberdeen, and Redfield, SD, and Crawford, NE; and with Nebkota Railway, Inc., at Chadron, NE. DM&E can also conduct, via its overhead trackage rights on UP's Hartland-Mason City line, restricted interchanges with CEDR at Glenville, MN, and with IANR at Manly, IA. Although the lines of DM&E and IC&E

⁴ DM&E's Hartland-Mason City trackage rights are restricted: to interchanging traffic with UP at Mason City; and to interchanging limited categories of traffic with Cedar River Railroad Company (CEDR) at Glenville, MN, and with Iowa Northern Railway Company (IANR) at Manly, IA.

cross at grade and connect in Owatonna, MN, DM&E and IC&E cannot (for the most part) interchange at that location due to restrictions on DM&E's trackage rights on the UP-owned "island" trackage through Owatonna.⁵

Iowa, Chicago & Eastern Railroad Corporation. IC&E, a Class II railroad, owns or operates approximately 1,397 route miles of rail lines (including approximately 786 route miles of main lines and approximately 611 route miles of secondary or branch lines) in Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois. All of these lines were recently acquired by IC&E from I&M Rail Link, LLC (I&M), in an asset acquisition transaction (the IC&E/I&M asset acquisition transaction).⁶ IC&E began rail operations on July 30, 2002, upon consummation of the IC&E/I&M asset acquisition transaction. IC&E's principal routes extend from Chicago, IL, to Sabula Junction, IA, and from there both southwest to Kansas City, MO, and northwest to Minneapolis/St. Paul, MN. Significant secondary routes — known as the Corn Lines — extend across Southern Minnesota from Ramsey, MN, to Jackson, MN, and across Northern Iowa from Marquette, IA, to Sheldon, IA. Branch lines extend from Davis Junction, IL, through Rockford, IL, and Beloit, WI, to Janesville, WI; from Mason City, IA, to Comus, MN; from Wells, MN, to Minnesota Lake, MN; from Davenport, IA, to Albany, IL, via trackage rights on BNSF; and from Davenport, IA, to Eldridge, IA. IC&E has overhead trackage rights over other railroads at a number of locations, including over CP between River Junction, MN, and Merriam Park, MN, and between Comus, MN, and Rosemount, MN; over IANR between Nora Springs, IA, and Plymouth Junction, IA (connecting two IC&E line segments); and over the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, d/b/a Metra, between Pingree Grove, IL, and Cragin Junction in Chicago, IL.⁷

IC&E's principal yard and terminal facilities are located at Davenport, IA, Ottumwa, IA, Muscatine, IA, Marquette, IA, Mason City, IA, West Davenport, IA, Savanna, IL, and Davis Junction, IL. IC&E owns a non-controlling stock interest in the Kansas City Terminal Railway

⁵ DM&E's overhead trackage rights on UP's Hartland-Mason City line do not allow DM&E to interchange with IC&E at Albert Lea, MN, or Mason City, IA, two points at which IC&E lines connect with UP's Hartland-Mason City line.

⁶ See Iowa, Chicago & Eastern Railroad Corporation — Acquisition and Operation Exemption — Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (STB served June 12, 2002, June 26, 2002, and July 22, 2002) (IC&E Acquisition).

⁷ Applicants indicate that IC&E will shortly commence operations into Chicago via the Pingree Grove-Cragin Junction line pursuant to a temporary detour agreement with Metra. Applicants add that, in the interim, IC&E traffic to/from the Chicago terminal has been handled via haulage arrangements with other railroads.

Company (KCT), a switching and terminal carrier in Kansas City, KS/MO. IC&E is also a joint owner with The Kansas City Southern Railway Company (KCS) of the “Joint Agency” yard facility in Kansas City, MO. IC&E interchanges traffic: with The Belt Railway Company of Chicago (BRC) at Cragin Junction/Clearing, IL; with BNSF at East Moline, IL, Moline, IL, Bettendorf, IA, Ottumwa, IA, Minneapolis/St. Paul, MN, and Kansas City, MO; with CEDR at Charles City, IA, and Lyle, MN; with Chicago, Central & Pacific Railroad Company at Dubuque, IA, and Rockford, IL; with the Chillicothe-Brunswick Rail Authority at Chillicothe, MO; with the Elgin, Joliet & Eastern Railway Company at Spaulding, IL; with Illinois RailNet, Inc., at Davis Junction, IL; with the Indiana Harbor Belt Railroad Company (IHB) at Franklin Park, IL; with Iowa Interstate Railroad Ltd. at Rock Island, IL, and Davenport, IA; with IANR at Nora Springs, IA, and Plymouth Junction, IA; with the Iowa Traction Railroad Company at Mason City, IA; with KCS at Kansas City, MO; with the Minnesota Commercial Railway Company at Minneapolis/St. Paul, MN; with Norfolk Southern Railway Company at Birmingham, MO, and Kansas City, MO; with CP at Bensenville, IL, Minneapolis/St. Paul, MN, Northfield, MN, and River Junction, MN; with UP at Clinton, IA, Emmetsburg, IA, Mason City, IA, Sheldon, IA, Minneapolis/St. Paul, MN, Kansas City, MO, and Janesville, WI; and with Wisconsin & Southern Railway Company at Janesville, WI. IC&E also interchanges with all major line-haul carriers at Chicago, through intermediate switching services provided by BRC, IHB, and CP.⁸

Cedar American Rail Holdings. Holdings, a wholly owned noncarrier subsidiary of DM&E, is the beneficial owner of all of the outstanding common stock of IC&E. Applicants indicate, however, that, immediately prior to the consummation of the IC&E/I&M asset acquisition transaction, Holdings placed the stock of IC&E into an independent voting trust, where it will remain pending action by the Board on the primary application. Applicants further indicate that, although it is anticipated that, if the primary application is approved, Holdings would function as if it were a holding company for DM&E and IC&E (i.e., Holdings would oversee the management and coordination of operations on the DM&E/IC&E system and would perform marketing and administrative services for both DM&E and IC&E, as if each of DM&E and IC&E were a wholly owned subsidiary of Holdings), DM&E’s capital structure did not easily allow for the creation of a holding company in the normal corporate chain position above DM&E. Holdings, applicants therefore assert, was created as a subsidiary of DM&E (i.e., positioned in the corporate chain between DM&E and IC&E).

The DM&E/IC&E Common Control Transaction: The Mechanics; Timing. The DM&E/IC&E common control transaction proposed in the primary application contemplates the acquisition, by DM&E, of indirect control of IC&E through the termination of the voting trust in which

⁸ IC&E’s overhead traffic rights on CP’s River Junction-Twin Cities line do not allow IC&E to interchange with DM&E at Minnesota City, MN, or Winona, MN, two points at which DM&E lines connect with CP’s line.

the IC&E stock is currently held and the distribution of that stock to Holdings, DM&E's wholly owned subsidiary. Applicants indicate that, if and when control is consummated, Holdings would function as if it were the holding company for both DM&E and IC&E and would oversee the distinct but coordinated operations of DM&E and IC&E, which would remain separate entities and which would conduct their own operations with their own employees and would be responsible for their own transportation, mechanical, and engineering functions. Applicants further indicate that DM&E would consummate control of IC&E (through termination of the IC&E voting trust, which would allow Holdings to exercise control over the IC&E stock) as soon as a Board decision approving the primary application and authorizing the DM&E/IC&E common control transaction has become effective.

Public Interest Considerations: In General. Applicants contend that the proposed DM&E/IC&E common control would strengthen the combined DM&E/IC&E system and improve both its operating and financial performance. Common control, applicants argue, would allow both railroads to serve their customers more effectively and to compete more effectively with Class I railroads, motor carriers, and barge transportation in the mid-American transportation market. Customers on both carriers, applicants maintain, would benefit from the better equipment coordination and utilization, improved service patterns, and other operating efficiencies made possible by common control. The larger and more diversified traffic base and greater financial resources of the combined DM&E/IC&E system, applicants argue, would provide a more stable and reliable environment for shippers on both railroads. Grain shippers on both DM&E and IC&E, applicants contend, would benefit from having access to a combined, coordinated system fleet of over 6,100 covered hopper cars. And, applicants maintain, common control would provide shippers and receivers on DM&E and IC&E with new, independent routing and service options and more efficient and competitive single-system access to significant new markets and gateways.

Applicants maintain, with respect to DM&E, that common control would allow DM&E to gain independent access to major markets and gateways. Shippers on DM&E's lines, applicants claim, would benefit from new single-system rail access to the longer river shipping season at Mississippi River ports south of Winona, MN, and grain shippers would enjoy, for the first time, independent, single-system access to the major rail gateways of Chicago and Kansas City, new single-system routes to major grain processing plants on IC&E, new independent joint-line routes to processors elsewhere in Iowa (such as on IANR in Cedar Rapids), and neutral interline access to significant long-haul destination markets in the south-central United States. And common control, applicants maintain, would guarantee that DM&E would have neutral eastern routings for coal movements from the Powder River Basin (PRB) in Wyoming, if and when DM&E constructs its recently-approved line into the PRB.⁹

⁹ See Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder
(continued...)

Applicants maintain, with respect to IC&E, that, after many years of doubt regarding the viability of the rail lines now owned by IC&E, common control of DM&E and IC&E would solidify the return of those lines as a stable, reliable, and essential component of the regional rail network in the north-central United States. Grain shippers on IC&E's lines, applicants argue, would gain potential new routes to the Pacific Northwest for export, while grain receivers on IC&E's lines and elsewhere in Iowa would be assured continued reliable, independent, and long-term access to grain from origins both on IC&E's Corn Lines and also on DM&E's lines in southern Minnesota and South Dakota. And, applicants assert, IC&E's largest customer, a steel manufacturing firm near Davenport, IA, would have single-system service for inbound scrap that currently originates on DM&E but must now be interchanged to an intermediate carrier for interchange to IC&E.

Public Interest Considerations: Competitive Impacts. Applicants contend that the proposed DM&E/IC&E common control transaction, which they describe as completely "end-to-end" in nature, would have no adverse impact on competition. DM&E and IC&E, applicants state, serve no common industries today and do not currently interchange traffic at any location, and, therefore, common control would not result in any reduction in existing rail-to-rail competition at any point or in any market. No shipper, applicants maintain, would lose competitive rail service or access to any existing routing options as a result of common control. The combined DM&E/IC&E system, applicants assert, would face intense competition from the large Class I rail systems that would surround it. And common control, applicants argue, would have no adverse impact on the continuation of essential transportation services by DM&E, by IC&E, or by any other railroad, and diversions of traffic from other railroads, applicants maintain, would be minimal.¹⁰

Environmental Implications. Applicants contend that, under 49 CFR 1105.6(c)(2)(i), the DM&E/IC&E common control proposal is categorically excluded from environmental reporting requirements because (applicants maintain) common control would not result in changes in carrier operations that would exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5). Applicants further contend: that common control would result in a minor increase (no more than several trains per

⁹(...continued)

River Basin, STB Finance Docket No. 33407 (STB served Jan. 30, 2002) (PRB Construction), pet. for judicial review pending sub nom. Mid States Coalition for Progress et al. v Surface Transportation Board et al., No. 02-1359 et al. (8th Cir. filed Feb. 7, 2002).

¹⁰ Applicants anticipate that, as a result of common control, approximately 9,850 carloads of traffic would be diverted to the combined DM&E/IC&E system annually, generating annual revenues of approximately \$8.1 million. Applicants indicate that, for the most part, these diversions would represent extensions of haul on existing DM&E traffic resulting from shippers favoring the single-system service offerings of the combined DM&E/IC&E.

week) in traffic over IC&E's rail line between Owatonna, MN, and Mason City, IA; that this, however, would be offset by a roughly corresponding decrease in train operations over DM&E's Waseca, MN-Hartland, MN, line and UP's Hartland, MN-Mason City, IA, line (which includes UP's "Spine Line" route between Albert Lea, MN, and Mason City, IA); and that anticipated traffic increases elsewhere on the combined DM&E/IC&E system would be handled in existing scheduled train movements.¹¹

Historic Preservation Implications. Applicants contend that, under 49 CFR 1105.8(b)(1) and (3), the DM&E/IC&E common control proposal is exempt from historic preservation reporting requirements. Applicants reason: that rail operations would continue after consummation of common control; that there would not be a substantial change in the level of maintenance of railroad property; that further Board approval would be required to abandon any service; and that there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

Labor Protection. Applicants acknowledge that the applicable level of labor protection for the proposed DM&E/IC&E common control transaction would be that set forth in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979). Applicants add, however, that they do not anticipate that any existing DM&E or IC&E employees would be adversely affected by DM&E/IC&E common control.

Related Filing: Terminal Trackage Rights Application. In STB Finance Docket No. 34178 (Sub-No. 1), DM&E has filed, contingent upon approval of the DM&E/IC&E common control proposal, a "terminal trackage rights" application for an order under 49 U.S.C. 11102 that would permit DM&E to operate, without restriction, over approximately 3,700 feet of UP track in Owatonna, MN (extending between approximately MPs 88.6 and 87.9), in order to establish an unrestricted connection at Owatonna between DM&E and IC&E.

¹¹ As we announced in our IC&E Acquisition decision served July 22, 2002 (at 16-17), we do not intend to consider the potential environmental impacts associated with the prospect of routing over former I&M lines traffic to or from the new line that we have approved for construction in PRB Construction unless and until DM&E is prepared to build that line. As we explained, deferring any such examination is appropriate given the current uncertainty as to whether that line will be built and, if built, what portion of the traffic to and from the new line would move over which I&M lines. Because the information we would need to assess the potential environmental impacts is not yet available, it would be premature to attempt to conduct such an assessment now. In the meantime, we have barred IC&E from handling over former I&M lines any trains moving to or from the new line until we conduct an appropriate environmental review of the cumulative impacts of the approvals that we issued in those two cases together with the approval that the applicants seek in this case.

DM&E explains: that, when it was created in 1986 as a spinoff from the Chicago & North Western Transportation Company (C&NW), it acquired from C&NW approximately 1,000 miles of rail lines and related trackage rights in South Dakota, Minnesota, and Iowa, extending in a generally west-east direction between Rapid City, SD, and Winona, MN; that, for the most part, DM&E acquired, in 1986, ownership of the Rapid City-Winona line; that, however, DM&E did not acquire, in 1986, ownership of the 2.4-mile segment of that line that lies in Owatonna between approximately MPs 88.6 and 86.2, which included (at approximately MP 87.9) a physical at-grade connection with a north-south CP line; that, as respects this 2.4-mile segment, DM&E acquired, in 1986, trackage rights that were both exclusive (C&NW did not retain the right to operate over the segment) and restricted (DM&E was allowed to use the trackage rights for overhead traffic, and for any DM&E/CP interchange traffic that originated or terminated either on the 2.4-mile segment or at industries in Owatonna served by CP and open to reciprocal switching); that C&NW retained ownership of the 2.4-mile segment and all ancillary trackage in Owatonna; and that the 2.4-mile segment was “carved out” of the DM&E/C&NW asset acquisition transaction in order to preclude an unrestricted DM&E/CP interchange at Owatonna.

DM&E further explains that, although C&NW’s ownership interest in the 2.4-mile segment was acquired several years ago by UP, and although CP’s (later I&M’s) north-south line through Owatonna was recently acquired by IC&E, a restriction created in 1986 that precluded the movement, under DM&E’s trackage rights, of most DM&E/CP interchange traffic continues to exist, and now bars the creation of a meaningful DM&E/IC&E interchange at Owatonna. This restriction continues to exist, DM&E adds, even though the 2.4-mile segment has not been used by C&NW (or UP) since 1986, and even though the 2.4-mile segment now exists as an “island” that is not connected to the rest of the UP system.¹²

DM&E contends that terminal trackage rights over an approximately 0.7-mile portion of the 2.4-mile segment (i.e., over the portion of the 2.4-mile segment that lies between approximately MPs 88.6 and 87.9) would be necessary to establish a direct connection and unrestricted interchange between DM&E and IC&E, which (DM&E notes) do not presently connect with each other at any location. DM&E further contends that, without such relief, DM&E and IC&E would be unable to effectuate the competitive traffic routings that would otherwise be made possible by the DM&E/IC&E combination. A DM&E/IC&E interchange at Owatonna, DM&E argues, would be essential for applicants to achieve many of the competitive and service benefits of DM&E/IC&E common control.

¹² The UP (formerly C&NW) north-south “Spine Line” between the Twin Cities and Kansas City passes under the 2.4-mile segment (at approximately MP 88.5) but does not connect with that segment.

DM&E asserts that a grant of the sought terminal trackage rights would also be necessary to allow DM&E to operate via trackage rights over IC&E's line between Owatonna, MN, and Mason City, IA, as contemplated by the trackage rights exemption notice filed in STB Finance Docket No. 34178 (Sub-No. 2). DM&E explains that the ability to operate over IC&E to Mason City would provide DM&E with efficient and unrestricted interchanges: with CEDR at Lyle, MN; with IANR at Plymouth Junction, IA, and Nora Springs, IA; and with IC&E at Mason City, IA.

DM&E acknowledges that, in the recent PRB Construction decision, the Board granted DM&E authority to construct, just east of Owatonna, a 1.7-mile "loop" connection between DM&E's west-east line (beginning at a point past the end of the 2.4-mile segment) and what was then I&M's (and is now IC&E's) north-south line. See PRB Construction, slip op. at 19, 41 (the 1.7-mile loop is "Alternative O-4," which DM&E was authorized to construct if it could not reach an agreement with UP for a DM&E/I&M interchange at MP 87.9, referred to as "Alternative O-5"). DM&E argues, however, that, as the Board itself has concluded, see PRB Construction, slip op. at 19, a MP 87.9 interchange would be "environmentally preferable" to construction of the 1.7-mile loop. And, DM&E asserts, given that the only obstacle to a MP 87.9 interchange is a 1986 restriction, construction of the 1.7-mile loop would be completely unnecessary and wasteful.

DM&E therefore asks that we allow the establishment of an unrestricted DM&E/IC&E connection at Owatonna by granting its application for terminal trackage rights between approximately MPs 88.6 and 87.9. DM&E further contends that, although 49 U.S.C. 11102(a) provides that compensation for use of terminal trackage rights "shall be paid or adequately secured" before a carrier may begin to use such rights, we should not require that the compensation be established before DM&E could begin use of the proposed STB Finance Docket No. 34178 (Sub-No. 1) terminal trackage rights. Such a requirement, DM&E explains, would delay the public benefits of the proposed DM&E/IC&E common control.

Related Filing: Trackage Rights Exemption Notice. In STB Finance Docket No. 34178 (Sub-No. 2), DM&E has filed, contingent upon approval of both the DM&E/IC&E common control transaction and the Sub-No. 1 terminal trackage rights application,¹³ a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain overhead trackage rights: (1) on the IC&E line between Owatonna, MN (at approximately MP 101.9), and Mason City, IA (at approximately MP 0.0), a distance of

¹³ DM&E indicates that, although the notice of exemption (filed August 29, 2002) respecting the exempt trackage rights transactions in STB Finance Docket No. 34178 (Sub-No. 2) would become effective prior to the effective date of a Board decision on the primary application and Sub-No. 1 terminal trackage rights application, consummation of the Sub-No. 2 trackage rights transactions is contingent on approval of both the primary application and the Sub-No. 1 terminal trackage rights application.

approximately 72.4 miles;¹⁴ and (2) on the IANR line between Plymouth Junction, IA (at approximately MP 219.5), and Nora Springs, IA (at approximately MP 210.7), a distance of approximately 8.8 miles. The Sub-No. 2 trackage rights, which are being sought with the approval of IC&E and IANR, would allow DM&E to interchange traffic: with IC&E at Austin, MN, and Mason City, IA; with UP at Mason City, IA; with CEDR at Lyle, MN; and with IANR at Plymouth Junction and Nora Springs, IA. DM&E indicates that the Sub-No. 2 trackage rights would facilitate the effective movement of trains and interchange of traffic between DM&E and IC&E, would expand routing and service options with other rail carriers, and would reduce trackage rights fees paid to UP in connection with DM&E's existing route to Mason City. DM&E acknowledges that the applicable level of labor protection for the Sub-No. 2 trackage rights would be that set forth in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980).

PRIMARY APPLICATION AND RELATED FILINGS ACCEPTED. We agree with applicants that the DM&E/IC&E common control transaction proposed in the primary application is a “minor transaction” under 49 CFR 1180.2(c), and we are accepting the primary application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. 11321-26; 49 CFR part 1180. We are also accepting for consideration the two related filings, which are also in compliance with the applicable regulations.¹⁵

PUBLIC INSPECTION. The application and the related filings are available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, D.C. In addition, they may be obtained from applicants' representatives (Mr. Sippel, for DM&E and Holdings; Mr. Knudson, for IC&E) at the addresses indicated above.

PROCEDURAL SCHEDULE. Applicants have indicated that they desire to consummate the DM&E/IC&E common control transaction as soon after January 1, 2003, as possible. They have therefore proposed a procedural schedule that provides for issuance of a decision by the Board by January 3, 2003, and if the application is granted, with an effective date of January 15, 2003.

We will adopt a 151-day procedural schedule that provides some additional time to that proposed by applicants for comments by interested parties, but still provides for less total time than the

¹⁴ At Ramsey, MN (an intermediate point between Owatonna and Mason City), there is a milepost equation at which MP 72.5 = MP 43.0.

¹⁵ We reserve the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter.

180-day procedural schedule (30 days + 105 days + 45 days) provided by the deadlines set forth at 49 U.S.C. 11325(a), (d)(2). Under the schedule we are adopting: all comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and/or either or both of the related filings, including comments of DOJ and DOT, will be due on **November 14, 2002**;¹⁶ responses to comments, protests, requests for conditions, and other opposition, responses to comments of DOJ and DOT, and rebuttal in support of the primary application and/or either or both of the related filings will be due on **December 13, 2002**; and our decision will be issued by **January 27, 2003** (the 45th day after the close of the record). If we determine that an Environmental Assessment or Environmental Impact Statement is required, we will adjust the procedural schedule as necessary. Also, if oral argument is held, our decision will be issued within 45 days after the oral argument.¹⁷

NOTICE OF INTENT TO PARTICIPATE. Any person who wishes to participate in this proceeding as a party of record (POR) must file with the Board, no later than **October 15, 2002**, an original and 25 copies of a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of the United States Department of Transportation, the Attorney General of the United States, and applicants' representatives. In addition, as previously noted, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

We will serve, as soon as practicable, a notice containing the official service list (the service list notice). Each party of record will be required to serve upon all other parties of record, within 10 days of the service date of the service list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each party of record also will be required to file with the Board, within 10 days of the service date of the service list notice, an original plus 10 copies of a certificate of service, along with an electronic copy, indicating that the

¹⁶ DOT, in its DOT-1 pleading filed September 18, 2002, has asked that we modify the procedural schedule to accommodate its past practice of filing comments not only in response to the application itself but also in response to the comments filed by other parties. As in past proceedings, we will allow DOT to file its comments in response to other parties' comments on the reply due date (here, December 13, 2002) should DOT decide to file such a response, with the understanding that applicants, if they feel the need, will be allowed to late-file (as quickly as possible) a reply to DOT's responsive comments. In this manner, we will not extend the procedural schedule unnecessarily.

¹⁷ If we ultimately decide to approve the DM&E/IC&E common control transaction, we will give consideration at that point to applicants' request that we shorten the usual 30-day period between the service date of an approval decision and the effective date of that decision. See DME-3 at 3 (applicants ask that any such approval become effective on the 12th day after the service date of our decision).

service required by the preceding sentence has been accomplished. Every filing made by a party of record after the service date of the service list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record (PORs), and therefore, need not be served with copies of filings, unless any such Member or Governor has requested to be, and is designated as, a POR.

We will serve copies of our decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, or GOV. All other interested persons are encouraged to make advance arrangements with the Board's copy contractor, D-2 D- Legal Copy Service, to receive copies of Board decisions, orders, and notices served in this proceeding. D-2 D- Legal Copy Service will handle the collection of charges and the mailing and/or faxing of decisions, orders, and notices to persons who request this service. The telephone number for D-2 D- Legal Copy Service is (202) 293-7776.¹⁸

COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION EVIDENCE AND ARGUMENT, INCLUDING FILINGS BY DOJ AND DOT. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and/or either or both of the related filings, including filings by DOJ and DOT, must be filed by **November 14, 2002**.

Parties (including DOJ and DOT) filing such comments, etc., must submit an original and 25 copies thereof. Each such submission: must be filed with the Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001; must refer to STB Finance Docket No. 34178; and must be clearly labeled with an identification acronym for that party and number for the submission by that party (e.g., the primary application was labeled "DME-2"), see 49 CFR 1180.4(a)(2). In addition, as previously noted, parties must submit one electronic copy of each document filed with the Board. Further details respecting such electronic submissions are provided below.

¹⁸ An interested person does not need to be on the service list to obtain a copy of the primary application or any other filing made in this proceeding. Our Railroad Consolidation Procedures provide: "Any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order." See 49 CFR 1180.4(a)(3). The primary application and other filings in this proceeding will also be available on the Board's website at "www.stb.dot.gov" under "Filings." Furthermore, D-2 D- Legal Copy Service will provide, for a charge, copies of the primary application or any other filing made in this proceeding, except to the extent any such filing is subject to the protective order previously entered in this proceeding.

Comments, etc., must be concurrently served by first class mail on the U.S. Attorney General and the U.S. Secretary of Transportation, applicants' representatives, and all other parties of record, and should include: the docket number and title of the proceeding and the name, address, and telephone number of the commenting party and its representative upon whom service shall be made.

Because we have determined that the DM&E/IC&E common control transaction proposed in the primary application is a minor transaction, no responsive applications will be permitted. See 49 CFR 1180.4(d)(1).

Protesting parties are advised that, if they seek either the denial of the primary application or the imposition of conditions upon any approval thereof, on the theory that approval without imposition of conditions will harm either their ability to provide essential services and/or competition, they must present substantial evidence in support of their positions. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

RESPONSES TO COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION, INCLUDING DOJ AND DOT; REBUTTAL IN SUPPORT OF PRIMARY APPLICATION. Responses to comments, protests, requests for conditions, and other opposition submissions, responses to comments of DOJ and DOT, and rebuttal in support of the primary application and/or either or both of the related filings must be filed by **December 13, 2002**.

DISCOVERY. Discovery may begin immediately. We encourage the parties to resolve all discovery matters expeditiously and amicably.

ELECTRONIC SUBMISSIONS: IN GENERAL. As already mentioned, in addition to submitting an original and 25 paper copies of each document filed with the Board, parties must submit, on 3.5-inch IBM-compatible floppy diskettes (disks) or on compact discs (CDs), copies of all textual materials, electronic workpapers, data bases, and spreadsheets used to develop quantitative evidence.¹⁹ Textual materials must be in, or compatible with, WordPerfect 9.0. Electronic spreadsheets must be in, or compatible with, Lotus 1-2-3 Release 9 or Microsoft Excel 2002. Each disk or CD should be clearly labeled with the identification acronym and number of the corresponding paper document, see 49 CFR 1180.4(a)(2), and a copy of such disk or CD should be provided to any other party upon request. Also, each disk or CD should be clearly labeled as containing confidential or redacted materials. The data contained on the disks and CDs submitted to the Board will be subject to the protective order granted in Decision No. 1, served August 14, 2002, and will be for the exclusive

¹⁹ Parties unable to comply with the electronic submission requirement can seek a waiver from the Board.

use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate timely review by the Board and its staff.²⁰

ELECTRONIC SUBMISSIONS: WORKPAPERS, DATA BASES, AND SPREADSHEETS. In the past, we have encountered problems with the “links” in spreadsheets functioning properly when the spreadsheets are installed on desktop computers or network servers. To avoid such problems, parties submitting electronic workpapers, data bases, and/or spreadsheets should use naming and linking conventions that will permit the spreadsheets to operate on the Board’s computers.²¹ Electronic data bases should be compatible with the Microsoft Open Database Connectivity (ODBC) standard.²² The Board currently uses Microsoft Access 2000, and data bases submitted should be either in this format or another ODBC-compatible format. Otherwise, submitters should explain why it is not possible to submit the data base in this format and seek a determination as to whether it is feasible for us to accept the data base in another format.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The primary application in STB Finance Docket No. 34178 and the related filings in STB Finance Docket No. 34178 (Sub-Nos. 1 and 2) are accepted for consideration.
2. The parties to this proceeding must comply with the Procedural Schedule adopted by the Board in this proceeding as shown in Appendix A.

²⁰ The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations.

²¹ We will not specify a particular naming and linking convention. It is incumbent upon the submitter to use generic naming and linking conventions that will permit the spreadsheets to operate on desktop computers or from a network server. Questions concerning naming and linking matters and/or compatibility with our computers can be addressed to William H. Washburn, Office of Economics, Environmental Analysis, and Administration, at (202) 565-1550.

²² ODBC is a Windows technology that allows a data base software package, such as Microsoft Access, to import data from a data base created using a different software package. All data bases must be supported with adequate documentation on data attributes, SQL queries, programmed reports, etc.

3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. This decision is effective on September 27, 2002.

Decided: September 19, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

APPENDIX A: PROCEDURAL SCHEDULE

August 29, 2002	Primary application, related filings, and petition for establishment of procedural schedule filed.
September 27, 2002	Board notice of acceptance of primary application and related filings published in the <u>Federal Register</u> .
October 15, 2002	Notices of intent to participate due.
November 14, 2002	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and/or either or both of the related filings, including filings of the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), due.
December 13, 2002	Responses to comments, protests, requests for conditions, and other opposition due. Responses to comments of DOJ and DOT due. Rebuttal in support of primary application and/or either or both of the related filings due.
January 27, 2003	Date of service of final decision (if no environmental review is required and no oral argument is held).